

This Opinion is Not a
Precedent of the TTAB

Mailed: February 10, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re CLAAS KGaA mbH
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Serial No. 87112755
Serial No. 87112787
(Consolidated)
—

Stewart J. Bellus of Collard & Roe, P.C.,
for CLAAS KgaA mbH.

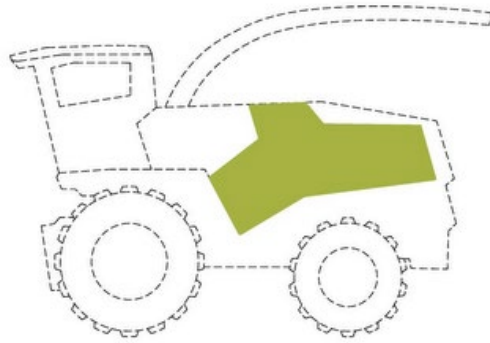
April L. Rademacher, Trademark Examining Attorney, Law Office 108,¹
Kathryn E. Coward, Managing Attorney.

—
Before Zervas, Goodman, and Larkin,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

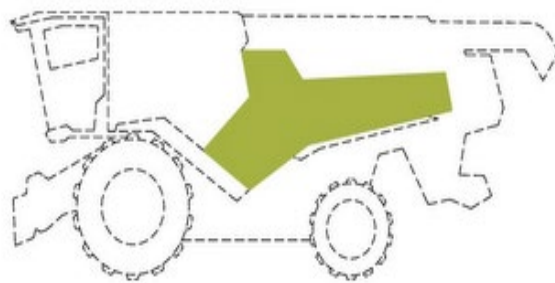
CLAAS KgaA mbH (“Applicant”) seeks registration on the Principal Register of
the proposed mark shown below for goods identified as a “forage harvester”:

¹ The involved applications were initially examined by Trademark Examining Attorney Cory Boone, who issued the first Office Actions in both cases before Trademark Examining Attorney Rademacher was assigned to the applications. We will refer to them both as the “Examining Attorney.”



2

and the proposed mark shown below for goods identified as a “combine harvester”:



3

² Application Serial No. 87112755 was filed on July 22, 2016 under Section 44(d) of the Trademark Act, 15 U.S.C. § 1126(d), on the basis of Applicant’s German application No. 302016101104.1. The proposed mark is described as consisting of “a stylized letter ‘Y’ positioned on both lateral outer contours of the harvester cladding downstream from the vehicle cab in the longitudinal direction of the harvester. The stylized ‘Y’ trademark is positioned on an outer contour of the vehicle so that its long leg extends away from the position of the vehicle cab in the longitudinal direction of the vehicle and the short leg delimits the long leg on the side facing the cab so that one short leg of the stylized ‘Y’ is oriented upward in the vertical direction and the other leg of the stylized ‘Y’ is oriented downward in the vertical direction. The boundary lines of the adjacent legs meet and form an obtuse angle in each case. The stylized letter ‘Y’ is colored in green.” The color green is claimed as a feature of the mark.

³ Application Serial No. 87112787 was filed on July 22, 2016 under Section 44(d) of the Trademark Act, 15 U.S.C. § 1126(d), on the basis of Applicant’s German application No. 302016101109.2. The proposed mark is described as consisting of “a stylized letter ‘Y’ positioned on both lateral outer contours of the harvester cladding downstream from the vehicle cab in the longitudinal direction of the harvester. The stylized ‘Y’ trademark is positioned on an outer contour of the vehicle so that its long leg extends away from the position of the vehicle cab in the longitudinal direction of the vehicle and the short leg delimits the long leg on the side facing the cab so that one short leg of the stylized ‘Y’ is oriented upward in the vertical direction and the other leg of the stylized ‘Y’ is oriented downward in the vertical direction. The boundary lines of the adjacent legs meet and form

The Trademark Examining Attorney has refused registration of both of Applicant's proposed marks under Sections 1, 2, and 45 of the Trademark Act, 15 U.S.C. §§ 1051, 1052, and 1127, on the ground that they are merely ornamental.

After the Examining Attorney made the refusals final in each application, Applicant appealed and requested reconsideration in both cases, which was denied. The appeals have been consolidated and are fully briefed.⁴ We affirm the refusals to register.

I. Prosecution History and Record on Appeal⁵

We summarize below the lengthy prosecution histories of the involved applications because they provide useful background to our analysis of the issues on appeal.

The Examining Attorney initially refused registration of both proposed marks on the Principal Register on the ground that each mark was a non-distinctive design of the goods.⁶ The Examining Attorney also requested that Applicant provide certain information and documentation directed to the possible functionality of the proposed

an obtuse angle in each case. The stylized letter 'Y is colored in green." The color green is claimed as a feature of the mark.

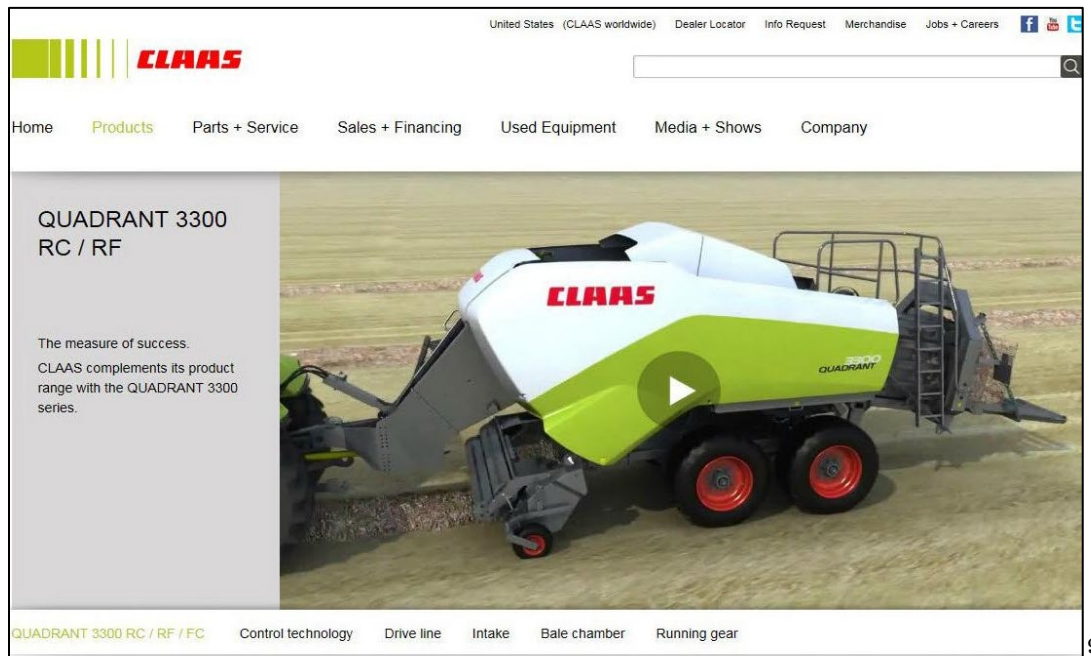
⁴ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. Unless otherwise indicated, citations are to the TTABVUE file in Application Serial No. 87112755.

⁵ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO").

⁶ November 4, 2016 Office Actions at TSDR 1.

Serial Nos. 87112755 and 87112787 (Consolidated)

marks pursuant to Trademark Rule 2.61(b), 37 C.F.R. § 2.61(b),⁷ and made of record pages from Applicant's website,⁸ one of which we reproduce below:



Applicant responded to both office actions by arguing that its proposed marks were not product designs, but rather configurations applied to the respective goods, and addressing the Examining Attorney's information requests.¹⁰

The Examining Attorney then suspended the examination of both applications pending receipt of the underlying foreign registrations of the proposed mark.¹¹ Applicant subsequently made of record European Union Registration No. 015816077

⁷ *Id.*

⁸ *Id.* at TSDR 3-5.

⁹ *Id.* at TSDR 3 (Serial Nos. 87112755 and 87112787).

¹⁰ May 1, 2017 Responses to Office Actions at TSDR 1.

¹¹ June 18, 2017 Suspension Notices at TSDR 1.

in Application Serial No. 87112755,¹² and European Union Registration No. 015612286 in Application Serial No. 87112787.¹³

When examination resumed, the Examining Attorney issued second Office Actions in each case continuing the refusals to register on the ground that the claimed marks were non-distinctive product designs and requiring amendments to the identifications of the goods to conform to the identifications in the European Union registrations,¹⁴ which amendments the Examining Attorney subsequently entered by Examiner's Amendments.¹⁵ Applicant responded to the second Office Actions by reiterating that its proposed marks were not product designs.¹⁶

The Examining Attorney then issued third Office Actions withdrawing the refusals based on the status of the proposed marks as non-distinctive product designs, but refusing registration on the new ground that each of the proposed marks was merely a decorative or ornamental feature of the goods.¹⁷

Applicant traversed the new refusals by arguing that the proposed marks were unique and highly-visible designs that enabled viewers to identify the brands of the goods.¹⁸ Applicant made of record promotional materials showing the use, on other of

¹² November 2, 2017 Response to Suspension Notice at TSDR 1-5 (Serial No. 87112755).

¹³ November 2, 2017 Response to Suspension Notice at TSDR 1-5 (Serial No. 87112787).

¹⁴ December 31, 2017 Office Actions at TSDR 1.

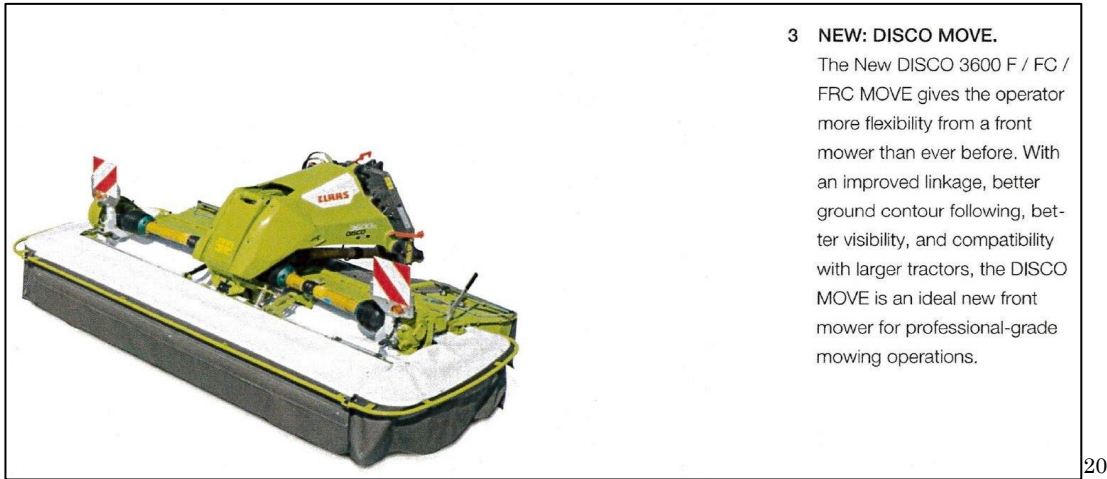
¹⁵ June 18, 2018 Examiner's Amendments at TSDR 1.

¹⁶ June 26, 2018 Responses to Office Actions at TSDR 1.

¹⁷ August 7, 2018 Office Actions at TSDR 1.

¹⁸ November 27, 2018 Responses to Office Actions at TSDR 1.

products, of the green color that is claimed as part of both marks.¹⁹ We reproduce one of those materials below:



The Examining Attorney then issued fourth Office Actions making final the ornamentation refusal to registers.²¹ The Examining Attorney made of record webpages from sellers of the goods identified in the application, which she claimed showed that such sellers deploy their trademarks in a different size and placement from those of Applicant's proposed marks.²² We reproduce portions of three such webpages below:

¹⁹ *Id.* at TSDR 2-5.

²⁰ *Id.* at TSDR 3.

²¹ February 5, 2019 Final Office Actions at TSDR 1.

²² *Id.* at TSDR 82-85 (Serial No. 87112755).

Home In-Stock Equipment New Equipment

NEW HOLLAND
AGRICULTURE

2017 New Holland Agriculture FR Forage Cruiser SP Forage Harvesters FR650

Brochure




Save Like 0 Tweet G+ Share

2017 FR Forage Cruiser SP Forage Harvesters FR650 Overview & Specs

23

JOHN DEERE Equipment Finance Parts & Service Find a Dealer MyJohnDeere



8800 Self-Propelled Forage Harvester

- 832 hp Cummins® QSK 19.0L engine
- All-new design delivers improved serviceability with an integrated KP hoist, easy header hook-up and ground level fuel fill
- A best-in-class cab offers easier to use controls, better display access and visibility

Build Your Own

Find a Dealer
View Product Brochure
Request a Demo

Share Print

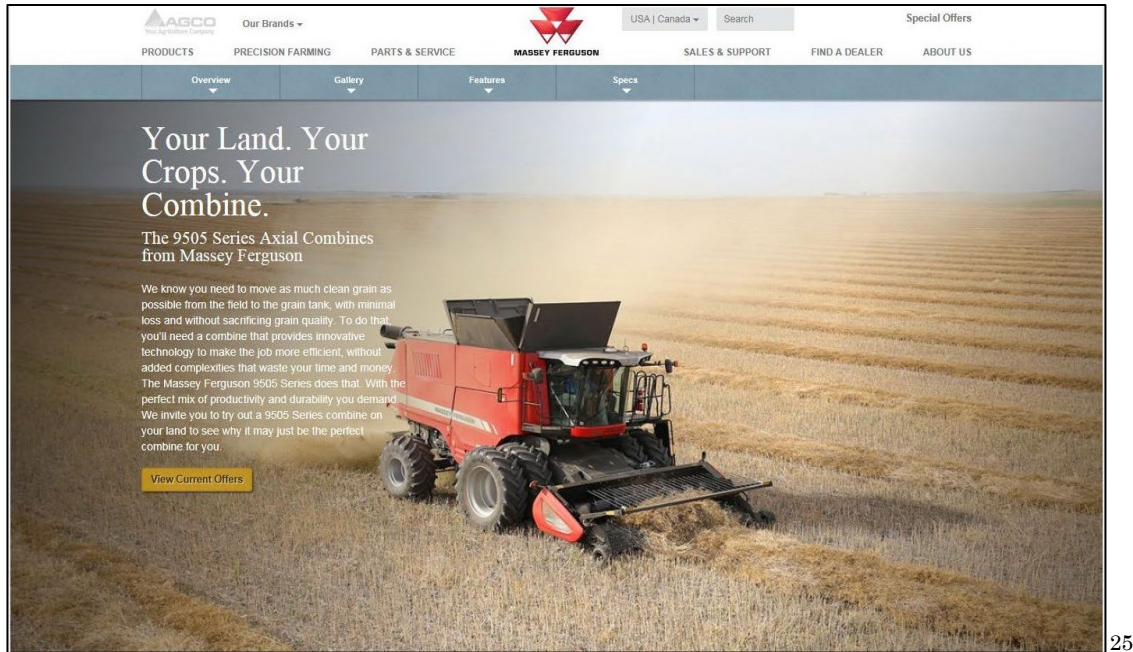
Features Expand All

Optimal design and positioning of components increases crop delivery performance

24

²³ *Id.* at TSDR 82.

²⁴ *Id.* at TSDR 83.



The Examining Attorney also made of record numerous third-party registrations of color marks for the involved goods, which either issued either on the Supplemental Register or issued on the Principal Register following a showing of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).²⁶

Applicant requested reconsideration of the final refusals. Applicant made of record numerous pictures of harvesters, which it claimed showed that manufacturers of harvesters brand their goods with marks that cover large portions of the goods and that could be seen at a distance,²⁷ pages from Applicant's website showing its harvesters,²⁸ third-party registrations of marks that Applicant claimed were similar

²⁵ *Id.* at TSDR 82 (Serial No. 87112787).

²⁶ *Id.* at TSDR 2-82 (Serial No. 87112755), 2-81 (Serial No. 87112787).

²⁷ May 1, 2019 Requests for Reconsideration at TSDR 2-36.

²⁸ *Id.* at TSDR 37-41.

in nature to its mark,²⁹ and a copy of a June 16, 2017 decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (the “EUIPO Decision”) reversing an examiner’s refusal to register a mark that appears to correspond to Applicant’s claimed mark in Application Serial No. 87112787.³⁰ We reproduce below a few samples of the pictures of competitive products and the pages from Applicant’s website:

4/17/2019 Massey Ferguson | 9500 Series Axial Combines



Capacity Without Complexity
The 9500 Series Axial Combines from Massey Ferguson

A direct result of listening to combine users, the 9500 Series combine combines rugged basics with advanced technology to deliver what you really want: more clean grain in the grain tank with less downtime, less maintenance - and less fatigue.

31

²⁹ *Id.* at TSDR 42-55.

³⁰ *Id.* at TSDR 56-64.

³¹ *Id.* at TSDR 3.



32



33

³² *Id.* at TSDR 10.

³³ *Id.* at TSDR 18.

4/30/2019 JAGUAR - Forage harvester | CLAAS



As soon as it made its debut, the JAGUAR series of forage harvesters impressed with its outstanding performance and low fuel consumption. And ever since, it has demonstrated how successfully CLAAS concentrates on consistent and practical development in this extremely demanding field.

 JAGUAR 980-930 Engine output: 462 - 884 hp Unique overall concept New header drive	 JAGUAR 880-840 Engine output: 408-626hp The running gear Excellent control concept	 Headers Multiple attachments for multiple crops.
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<https://www.claasofamerica.com/product/forage-harvesters> 2/3 34

The Examining Attorney denied the requests for reconsideration,³⁵ and the appeals resumed.

II. Ornamentation Refusal

A. Applicable Law

These cases present “the question of whether the public would perceive the [proposed marks] as an indicator of source (*i.e.*, a trademark) or, instead, merely as a form of decoration or ornamentation.” *In re Lululemon Athletica Canada, Inc.*, 105 USPQ2d 1684, 1686 (TTAB 2013).

Section 45 of the Trademark Act defines a “trademark” in relevant part as ‘any word, name, symbol, or device, or any combination thereof used by a person . . . to identify and distinguish his or her goods . . . from those manufactured

³⁴ *Id.* at TSDR 39.

³⁵ June 3, 2019 Denials of Requests for Reconsideration at TSDR 1.

or sold by others and to indicate the source of the goods, even if that source is unknown.”

In re Fantasia Distribution, Inc., 120 USPQ2d 1137, 1138 (TTAB 2016) (quoting 15 U.S.C. § 1127). “The critical inquiry in determining whether a designation functions as a mark is how the designation would be perceived by the relevant public.” *Id.* (quoting *In re Eagle Crest Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010)). “Subject matter that is perceived as merely decorative or ornamental does not identify source and thus fails to function as a mark.” *Id.*

“In considering whether matter is ornamental, or whether it inherently functions as a mark, relevant considerations include the commercial impression made by the design, the relevant practices of the trade, and evidence of distinctiveness, if applicable.” *Lululemon*, 105 USPQ2d at 1686. Because Applicant does not claim that either mark has acquired distinctiveness,³⁶ the pertinent factors here are the commercial impression made by the designs and the relevant practices of the trade.

³⁶ In its appeal brief, Applicant discusses its claimed use of “the combination of the unusual shade of green (claimed in this mark) with CLAAS in large, thick, red letters,” 4 TTABVUE 9, but states that it “is not seeking registration of a color scheme based upon acquired distinctiveness,” but rather “is seeking registration of a completely unique design in a specific color green (which happens to be familiar to its customers) that will be displayed on the side of its harvesters.” *Id.* In its reply brief, Applicant criticizes the Examining Attorney for arguing that Applicant “has not proven distinctiveness or secondary meaning” because “such proof is not needed when a logo or design mark is applied directly to the goods and functions as a mark.” 9 TTABVUE 6.

B. Applicant's and the Examining Attorney's Arguments

1. Applicant's Arguments

Applicant states in its appeal brief that its Request for Reconsideration in each case “compris[es] all the evidence upon which Applicant will rely during this appeal.” 4 TTABVue 3. Applicant argues that “agricultural harvesters and other large farm equipment are not products that typically are ornamented (unlike shirts, hats, bags, jewelry, or other fashion items),” and that its “goods are not ‘consumer products’ where visual presentation is crucial to the decision-making of potential purchasers,” but rather “expensive machines sold to a specific market (farmers and others engaged in large scale agriculture).” *Id.* at 4. According to Applicant, “[t]hese items are selected and purchased based solely on the capabilities and quality of the equipment because that is what matters most to those engaged in agriculture: can the equipment ‘do the job?’” *Id.*

Applicant further argues that

the markings associated with these types of machinery are more recognizable as trademarks than other types of products because those markings are precisely how purchasers distinguish one brand of harvester from another, with all that means in terms of what matters to their purchase, i.e., the quality or capabilities inferred from and attached to the trademark or brand.

Id. Applicant criticizes the Examining Attorney's examples of ornamentation on the ground that they are “examples of inexpensive consumer goods that often are selected exclusively for their ornamentation, style, color or decorative features, sometimes with complete *disregard* for brand names.” *Id.* at 5. Applicant also criticizes the Examining Attorney for “giv[ing] no weight to the fact that Applicant's ‘green ‘Y’ is a

unique design, in a specific color, and not merely (as in examples given by the examiner) a color ring around a sock, shapeless stripes on a sneaker, a typical flower design or an ‘I LOVE YOU’ slogan, all of which are widely used for decorative purposes.” *Id.* According to Applicant, its “‘green ‘Y’ design’ is not ornamental because it is fanciful, having no significance other than as Applicant’s trademark” and “[i]ts placement on the side of applicant’s harvester cannot be a refinement of a typical ornamentation practice . . . because farm equipment is not ornamented (and the examiner has not provided any evidence to the contrary).” *Id.*

With respect to the size, placement, and prominence of the proposed marks, Applicant argues that the Examining Attorney’s own evidence shows that farm equipment marks are displayed on the side of equipment, such that Applicant is using its proposed marks “in the exact location as competitors” *Id.* at 6. Applicant argues that “most manufacturers brand their equipment with names, logos, color and other schemes that are large, often covering major portions of the side of the harvester, tractor or other product,” *id.*, and that such “marks can be seen from a distance, specifically for the purpose of being able to distinguish one brand from another.” *Id.* at 7. Applicant cites pictures of various farm equipment made of record with its Requests for Reconsideration, which Applicant claims display “large lettering and/or large designs.” *Id.* Applicant argues that “the display of ‘large marks’ on the side to identify agricultural machinery brands is exactly the customary practice in the industry” and that it “is merely following this practice by affixing its ‘Y’ trademark to the side of its harvester.” *Id.* at 8.

Applicant also argues that “for years Applicant has branded its own machines with the combination of the unusual shade of green (claimed in this mark) with CLAAS in large, thick, red letters,” *id.* at 9, and that it has used “the green/red color scheme on the company website, in company promotional materials and as part of the appearance of physical locations,” citing its Requests for Reconsideration. *Id.* Applicant also points to third-party registrations of what it calls “marks similar to that of Applicant” *Id.* at 10. In its reply brief, Applicant argues that these registrations are “one indication that consumers have not been ‘conditioned’ to perceive these types of designs as ornamentation.” 9 TTABVUE 3.

Finally, Applicant argues that the EUIPO Decision

reiterates some of the important points raised here: 1) agricultural equipment typically is not ornamented; 2) farmers are sophisticated consumers who make purchasing decisions based on how well agricultural machinery performs desired tasks, not based on style; and 3) agricultural machinery commonly is marked with wording, colors and designs, and as a result, Applicant’s “green ‘Y’” will be seen by farmers as a trademark.

4 TTABVUE at 12.

In its reply brief, Applicant argues that the Examining Attorney has not met her burden of showing that Applicant’s proposed marks “would not be perceived as a trademark, but merely as ornamentation” because

there is 1) *no* evidence that large farm equipment commonly is *ornamented* with arbitrary designs to enhance its aesthetic appeal (though there is plenty of evidence showing that these designs are registered as trademarks, and do function as “source indicators”); 2) *no* evidence that relevant consumers (i.e., purchasers of large farm equipment) who see large designs and logos on harvesters and similar machinery assume those markings are merely

ornamentation; or c) no evidence that relevant consumers are likely to ignore the source indicator quality of Applicant's logo and design mark (instead, they see the logo and know if comes from Applicant, which is the exact purpose of a trademark). Stated simply, Applicant's design mark is a "trademark" and functions as a trademark, and the examiner has not proven that this conclusion is wrong.

9 TTABVUE 6-7.

2. The Examining Attorney's Arguments

The Examining Attorney argues that the Internet evidence of record shows that "consumers have been conditioned to recognize small designs or discrete wording as trademarks if placed on agricultural harvesters; however, consumers typically do not perceive larger designs as trademarks." 8 TTABVUE 6. She argues that Applicant's "marks are not small designs or discrete wording placed on the side of agricultural products" but instead are "large designs that cover significant portion of the products." *Id.* She "submits that based upon the size and placement of the marks on applicant's goods, consumers will view the mark as a merely ornamental design on the goods rather than an indicator of source." *Id.*

With respect to the record evidence displaying third-party farm equipment, the Examining Attorney "disagrees with applicant's assertion that its marks are used in a manner remotely similar to those of other manufacturers." *Id.* She argues that the "manner in which consumers are use [sic] to seeing trademarks for these types of goods, including applicant's own goods, is of lettering, which maybe [sic] large, but is small when compared to the size of applicant's goods." *Id.*

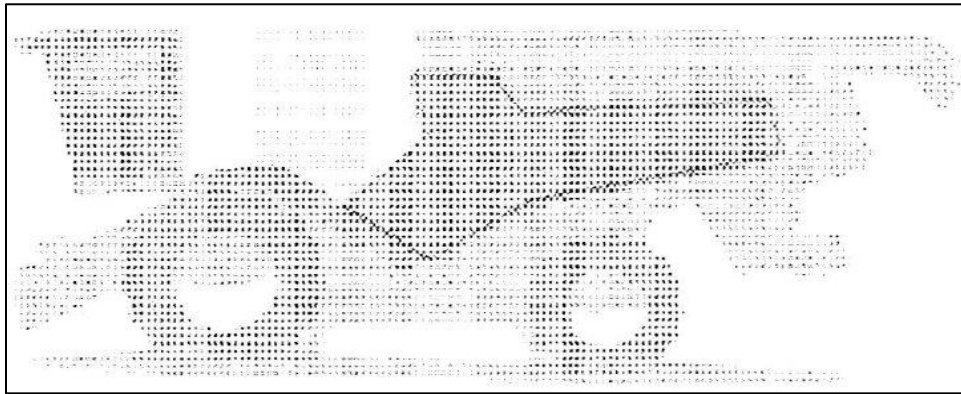
The Examining Attorney also argues that Applicant's proposed marks are not inherently distinctive. She argues that "[t]here is nothing about the appearance of

applicant's proposed mark that is original, distinctive or peculiar." *Id.* at 8. She contends that "by applicant's own admission harvesters are often ornamented by different colors or designs," *id.* (citing 4 TTABVUE 4), and that the record shows that "manufacturers of such equipment frequently ornament their equipment with large bright blocks of color, not dissimilar from the manner seen in applicant's proposed mark." *Id.* at 9. She argues that "based on the size and the placement of the mark on applicant's goods, consumers would perceive the mark as mere ornamentation and not as a source indicator, as it is a mere refinement of a typical practice of ornamentation on similar equipment." *Id.*

The Examining Attorney also rejects Applicant's reliance on the third-party registrations and the EUIPO decision. *Id.* at 7. She points to third-party registrations that she made of record, which she claims "show that the Office has held similar marks for color as a trademark on large areas of industrial and farm equipment to be registrable only on the Supplemental Register or on the Principal Register under a claim of acquired distinctiveness under Section 2(f)." *Id.* at 9. According to the Examining Attorney, these registrations are "evidence that consumers are accustomed to seeing large areas of agricultural and industrial equipment in solid colors and that marks such as these are not viewed as inherently distinctive." *Id.* She also notes that "there is no evidence of secondary source" that might bear on the distinctiveness of Applicant's proposed marks. *Id.* at 10.

C. Analysis of Ornamentation Refusal

We begin with the issue of whether to consider the EUIPO Decision on the registrability of the mark shown below, which appears to correspond roughly with the mark shown in Application Serial No. 87112787:



As Applicant acknowledges, “the rulings of trademark offices outside the US are not binding on the US PTO,” 4 TTABVUE 12, and we must apply United States law, not European Union law, to the issues on appeal. *See Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1479 (TTAB 2017) (sustaining objection to OHIM decision regarding registration of US applicant’s mark). We have not considered the EUIPO Decision beyond reviewing it to identify the involved mark.

We turn now to the issue of whether the proposed marks are ornamental. The record is devoid of evidence of the commercial impression actually made by the proposed marks, *Lululemon*, 105 USPQ2d at 1686, because there is no evidence of Applicant’s use of either of them. The record is replete, however, with evidence that “Applicant has branded its own machines with the combination of the unusual shade of green (claimed in this mark) with CLAAS in large, thick, red letters.” 4 TTABVUE

9. In addition to the uses of green on the equipment shown above, we reproduce below other examples of such use:



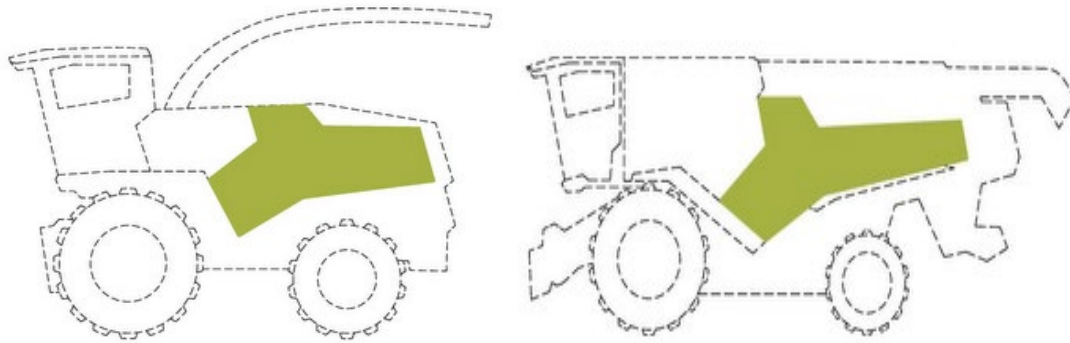
³⁷ November 27, 2018 Responses to Office Actions at TSDR 2.

³⁸ *Id.* Other “Rollant” models, including the 455, 340, and 250 models, are shown in the record. May 1, 2019 Requests for Reconsideration at TSDR 29, 31, 35-36.

³⁹ *Id.* at TSDR 4.

The record shows that Applicant's equipment consistently displays the shade of green that is claimed as part of the proposed marks, but the Federal Circuit has observed that "color is usually perceived as ornamentation. While ornamentation is not incompatible with trademark function, unless the design is of such nature that its distinctiveness is obvious, convincing evidence must be forthcoming to prove that in fact the purchasing public does recognize the design as a trademark which identifies the source of the goods." *In re Gen. Mills IP Holdings, LLC*, 124 USPQ2d 1016, 1018 (TTAB 2017) (quoting *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 227 USPQ 417, 422 (Fed. Cir. 1985) (internal quotation omitted)). Applicant's use of the green shade on its equipment, either in configurations other than those shown in the proposed marks, or over most or all of the surface area of the goods, is not "of such nature that its distinctiveness is obvious," *id.* and instead appears to be pure ornamentation.

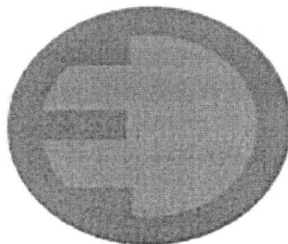
"In determining whether a design is inherently distinctive or merely ornamental, we have found it helpful to consider various aspects of designs and shapes, stating repeatedly, 'we must consider the size, location and dominance of the designs in determining the commercial impressions of designs.'" *Lululemon*, 105 USPQ 2d at 1687 (quoting *In re Right-On Co. Ltd.*, 87 USPQ2d 1152, 1156 (TTAB 2008)). Applicant argues that its "green 'Y' is a unique design, in a specific color," 4 TTABVUE 5, and "fanciful, having no significance other than as Applicant's trademark," *id.*, but we find that the designs, shown again below,



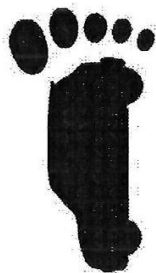
are simple and nondescript, especially when compared to the design marks in the third-party registrations that Applicant made of record to show that “marks similar to that of Applicant have been registered often at the PTO.” *Id.* at 10. We reproduce those marks below:



40



41



42

⁴⁰ May 1, 2019 Requests for Reconsideration at TSDR 43 (Registration No. 5509889 for utility vehicles and turf tractors).

⁴¹ *Id.* at TSDR 45-50 (Registration Nos. 3860895 and 3835700 for automobiles and components).

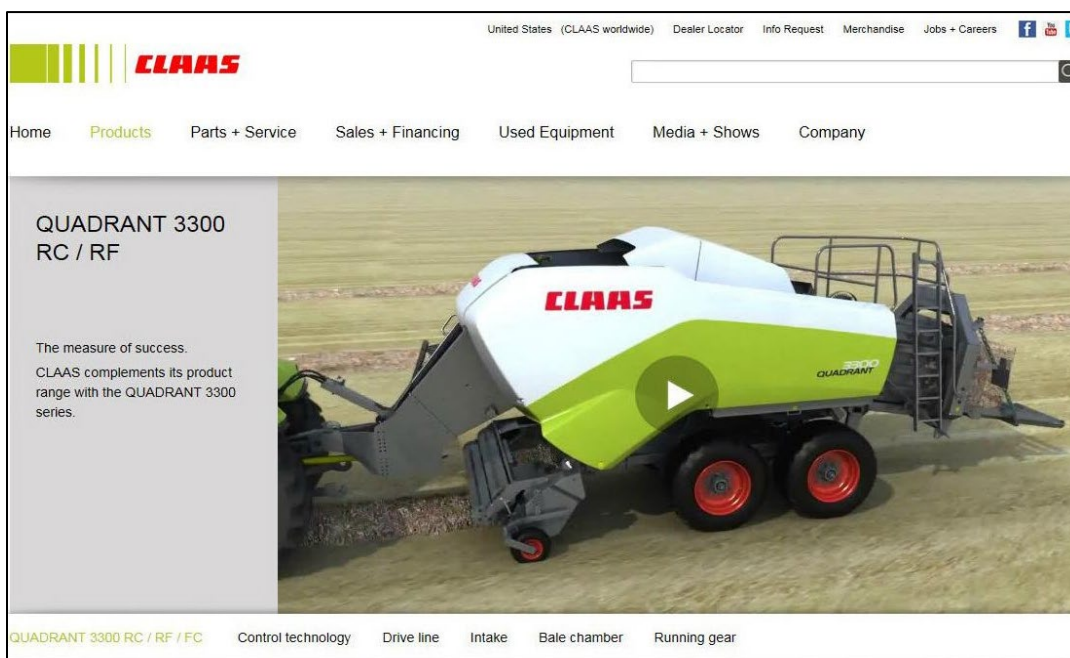
⁴² *Id.* at TSDR 51-52 (Registration No. 3667614 for automobile dealership services).



43

We find that Applicant’s “Y” designs, which serve as a carrier for its green color, are “unlike the highly stylized marks depicted above.” *Lululemon*, 105 USPQ2d at 1689.

Applicant also positions the “Y” designs on its equipment in a manner that is no more visually striking and source-identifying than the placement of the green design on the product shown below:



The juxtaposition of the green design on this product with the color white bearing the CLAAS mark appears to be purely aesthetic, and there is nothing in the record to suggest that the placement of the green “Y” designs on the goods will serve any

⁴³ *Id.* at TSDR 53-55 (Registration No. 3308221 for footwear).

purpose other than ornamentation. Notwithstanding the elaborate geometrical descriptions of the “Y” designs in the applications, we agree with the Examining Attorney that “[t]here is nothing about the appearance of applicant’s proposed mark[s] that is original, distinctive or peculiar.” 8 TTABVUE 8. Even if Applicant is the only current user of the green “Y” designs for farm equipment, “this fact alone does not imbue the design[s] with source-indicating significance where Applicant’s design[s]” merely use “an ordinary shape in an unremarkable [way]” and are positioned on the goods “in an unremarkable way.” *Fantasia Distribution*, 120 USPQ2d at 1141.

With respect to the relevant practices of the trade, *Lululemon*, 105 USPQ2d at 1686, Applicant argues that farm equipment marks are displayed on the side of equipment, such that Applicant is using its proposed marks “in the exact location as competitors,” 4 TTABVUE 6, and that the placement of the proposed marks “on the side of applicant’s harvester cannot be a refinement of a typical ornamentation practice . . . because farm equipment is not ornamented (and the examiner has not provided any evidence to the contrary).” *Id.* at 5. The latter argument, as well as other arguments regarding trade practices such as that “agricultural harvesters and other large farm equipment are not products that typically are ornamented,” *id.* at 4, that “the markings associated with these types of machinery are more recognizable as trademarks than other types of products because those markings are precisely how purchasers distinguish one brand of harvester from another,” *id.*, and that equipment “marks can be seen from a distance, specifically for the purpose of being able to

distinguish one brand from another,” *id.* at 7, are based entirely on the arguments of Applicant’s counsel. “Attorney argument is no substitute for evidence,” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018), and “there is no actual proof to support these statements in the record.” *In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014). *See also In re Budge Mfg. Co.*, 857 F.2d 773, 8 USPQ2d 1259, 1261 (Fed. Cir. 1988) (rejecting arguments of counsel regarding consumer purchase expectations).

The same is true for Applicant’s arguments directed to how consumers perceive the “names, logos, color and other schemes that are large, often covering major portions of the side of the harvester, tractor or other product.” *Id.* at 6. Applicant asserts, without supporting evidence, that “farm equipment is not ornamented,” *id.* at 5, such that colors and designs on farm equipment are invariably not ornamentation but rather would be viewed as marks, in the manner of accompanying brand names such as CLAAS, New Holland, and Massey Ferguson. The record does not support these positions. It shows that farm equipment commonly bears colors and designs, but does not show that those combinations of colors and designs, such as those shown below and elsewhere in the record, would automatically be recognized as source-identifiers, not ornamentation:



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The third-party registrations made of record by the Examining Attorney indicate that colors and designs appearing in various manners on farm equipment may be capable of functioning as marks, and may thus be registrable on the Supplemental

⁴⁴ May 1, 2019 Requests for Reconsideration at TSDR 7.

⁴⁵ *Id.* at TSDR 14.

Register,⁴⁶ or may actually function as marks through the acquisition of distinctiveness, and may thus be registrable on the Principal Register.⁴⁷ Applicant seeks Principal Register registrations based on the inherent distinctiveness of its proposed marks, however, and we find, on the basis of the record as a whole, that consumers are not likely to view Applicant's green "Y designs" as marks rather than as ornamentation.

Decision: The two refusals to register are affirmed.

⁴⁶ February 5, 2019 Final Office Actions at TSDR 47-52 (Registration Nos. 4097371 and 4097372 for a combination of tan and ivory applied to various portions of agricultural machinery) (Serial Nos. 87112755 and 87112787).

⁴⁷ *Id.* at TSDR 2-34, 53-67 (Registration Nos. 3857088, 3857089, 3857090, 3857091, 3857095, 3854018, 3854019, 3854020, 3857098, 3877113, 3877114, 4084100, 4084101, 4084102, 4084104, and 4084105 for a combination of green and yellow applied to various portions of tractors, harvesters, agricultural implements, mowers, and forestry machines); 35-46 (Registration Nos. 4030916, 4110890, 4027919, and 4170220 for a combination of orange-red, black, and white applied to various portions of loaders and excavators) (Serial Nos. 87112755 and 87112787).